Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-96-1*

FACTS:

A decision of the Energy Facilities Siting Board ("Board"), a state agency within the Department of Public Utilities,[1/] has been appealed to the Supreme Judicial Court. The appeal arose from the Attorney General's opposition to the Board's decision. When the Attorney General opposes a decision by a state agency, he has the authority to appoint legal counsel to represent the agency in a court proceeding. G. L. c. 12, §3. An attorney so appointed is designated a Special Assistant Attorney General ("SAAG") for the purposes of representing the state agency.[2/]

In a prior appeal of other Board decisions, the private attorney appointed to represent the Board received a letter of appointment from the Attorney General. In pertinent part, the letter reads:

> I hereby appoint you a Special Assistant Attorney General for the purpose of representing the Energy Facilities Siting Board in the following related cases: . . .
>
> A copy of the Office's Guidelines for Special Assistant Attorneys General, including reporting procedures, is enclosed for your information. Particular attention is drawn to the fact that, in order to maintain a consistent legal policy for the Commonwealth, Special Assistants are subject to the authority of the Attorney General to direct their activities, except in matters referred due to conflict of interest. This appointment is being made because of such a conflict of interest. Accordingly, the Office of the Attorney General will not direct and control your activities in the representation of your client.
>
> You should also be aware that your service as a Special Assistant Attorney General qualifies you as a "special state employee" within the meaning of the Massachusetts Conflict of Interest Law, G. L. c. 268A, §§1-25, and therefore subjects you to the provisions of that statute.
>
> Your appointment will terminate with the completion of your case assignment.

The SAAG representing the Board in the prior appeal resigned his appointment just before completion of the appeal because the Attorney General believed that the SAAG might have a conflict of interest under c. 268A. The source of potential conflict was a second case pending before the Supreme Judicial Court in which that same SAAG in his private practice represented a client opposed by the Attorney General. The second case did not involve the Board. The Attorney General concluded that the SAAG had a conflict of interest under G. L. c. 268A, §4 because he had been serving the Attorney General's Office in the first case for more than sixty days while also representing a private party in a second case pending in the Attorney General's Office.

The *Guidelines for Special Assistant Attorneys General*, March 9, 1993, which is provided to each SAAG, states that, under §4, a SAAG who performs work as a SAAG on more than sixty days during any 365 day period may not act as agent or attorney or accept or request compensation from anyone other than the Commonwealth in relation to any matter pending in the Attorney General's Office. *Guidelines* at 4-5. The *Guidelines* also states that SAAGs are subject to the authority of the Attorney General to direct their activities except with respect to matters referred because of conflicts of interest. "The scope of the authority delegated to each Special Assistant is limited to that described in the designation letter." *Guidelines* at 8. Reporting requirements under the *Guidelines* state that SAAGs must regularly report the status of litigation they are handling for the Office. "Special Assistants appointed to handle a particular case or cases should report at the time of any significant case activity or every six months, whichever is sooner. . . . In addition, . . . Special Assistants [appointed

to handle specified types of cases] should report and consult with the Office of the Attorney General in *advance of any particularly significant or unusual event* in any case." *Guidelines* at 11 (emphasis in original).

In cases such as this one involving the Board, the private attorney designated a SAAG receives neither support nor direction from the Attorney General's Office, according to the former SAAG who represented the Board in the prior appeal before the Supreme Judicial Court. His interaction with the Office consists of submitting a monthly accounting of his services so the Attorney General's Office may pay his bill.[3/]

QUESTION:

For the purposes of §4, in which agency is a SAAG serving when he is appointed to represent a state agency in a particular matter before a tribunal when the Attorney General opposes that state agency in that same particular matter?

ANSWER:

In circumstances in which a private attorney is appointed a SAAG to represent a state agency before a tribunal when the Attorney General opposes that state agency in such proceedings, the SAAG is serving only that state agency and not the Office of the Attorney General for purposes of applying the restrictions of §4.

DISCUSSION:

Section 4 generally prohibits state employees from being paid by or representing non-state parties in a particular matter of direct and substantial interest to the state. A special state employee, such as a SAAG, is subject to this prohibition only

> in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

G. L. c. 268A, §4.

The §4 exemption for special state employees represents a determination that the broad restrictions of §4 would make it impossible for the Commonwealth to have the service of specialists for special assignments. *Report of the Special Commission on Code of Ethics*, House No. 3650 of 1962, p. 13; Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 335 (1965). Similar policy concerns support the federal conflict of interest laws upon which §4 is based.[4/]

At the heart of the issue is what agency does a SAAG serve who is retained to represent a state agency because of the Attorney General's conflict of interest?

The possibility that a special state employee might simultaneously serve two state agencies in connection with the same particular matter in which the agencies oppose each other appears not to have been contemplated under the conflict of interest law.[5/] Our research indicates that service only to a single agency in the context of the §4 exemption for special state employees has been considered.[6/] See, e.g., *Report of the Special Commission on Code of Ethics*, House No. 3650 of 1962, p. 13;[7/] Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L.Rev. 299, 337-340 (1965)(suggesting an expansive definition of agency but not one that extends beyond a governmental department);[8/] Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law: Essays for Austin Wakeman Scott*, 3, 16-17 (1964) (discussing §17, the municipal counterpart to §4); Perkins, *The New Federal Conflict of Interest Law,* 76 Harv. L. Rev. 1113, 1149-1151 (discussing the federal law upon which G. L. c. 268A is based).

Our prior opinions that consider the special state employee exemption address only the §4 issues when a special state employee might represent private parties before the single agency to which he was assigned. See, e.g., *EC-COI-84-129* (attorney who acts as labor counsel to MHFA may represent clients before MHFA in matters in which he did not participate or have official responsibility so long as he serves MHFA less than sixty

days); *85-21* (consultant to the Executive Office of Energy Resources may not represent non-state parties in connection with matters pending in EOER); *90-12* (attorney who provides mediation services to Department of Environmental Protection may not represent private clients in connection with any matter pending within DEP); *90-16* (volunteer lawyers who serve as special assistant district attorneys to handle appeals for the district attorney are prohibited from privately representing clients in connection with matters pending in the district attorney's office). See, also, *Commission Advisory No. 13, Agency, Part B: State Employees Acting as Agent*.

An early Ethics Commission opinion, *EC-COI-80-66*, however, concluded that a SAAG who represented the Division of Water Pollution Control ("DWPC") could not also represent a private client before another state agency if the Attorney General's Office became involved in the other state agency matter and if the SAAG served more than sixty days during any three hundred and sixty-five day period. That opinion, however, appeared to assume without explanation that, for the purposes of §4, the SAAG would be serving both the agency to which he was assigned and the Attorney General's Office. That opinion also did not describe the reasons why a SAAG was assigned to represent the DWPC. See *EC-COI-80-66*. We agree with that opinion's conclusion with respect to SAAGs not assigned because of the Attorney General's opposition to a state agency's decision. With respect to the limited circumstances of the instant case, however, we clarify that particular conclusion of *EC-COI-80-66*.

In determining which agency the SAAG serves in these particular circumstances, we are guided by the legislative purpose behind §4. The goal of §4 is to prevent divided loyalty as well as influence peddling. *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610 (1984); *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984)(construing §17, the municipal counterpart to §4); *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977), cert. denied, 435 U.S. 933 (1978) (construing §17; Liacos, J., dissenting on other grounds. Section 17 "seeks to preclude circumstances leading to a conflict of loyalties." *Id.*). The concerns of §4 would not be raised when a SAAG represents only the Board in one particular matter opposed by the Attorney General while also representing only a private party in a second particular matter opposed by the Attorney General, so long as the second matter was not pending with the Board. Here, the loyalty of the SAAG is to the state agency to which he is assigned—the Board. He is to represent that agency's position in opposition to the Attorney General's. His duty to the Attorney General consists of only filing regular reports and submitting an accounting so he may be paid for his services. Moreover, the Attorney General's designation letter acknowledges that his Office is *not* the SAAG's client. It states that because of a conflict of interest, the Attorney General will not direct and control the SAAG's activities in the representation of the Board.

"The [additional] concern addressed by §4 is the potential for influencing pending agency matters." *EC-COI-91-5*. The sixty day limit, although arbitrary, represents a legislative decision that a special state employee whose services require more than that amount of time with an agency will have increased opportunities to influence that agency's pending matters. *EC-COI-91-5; 85-49*.[9/] The underlying assumption in the language from §4, "in the state agency in which he is serving" is a special state employee's ability to influence that particular state agency. It therefore follows that if a SAAG representing the Board does not have the opportunity to influence the Attorney General's Office in other matters pending in the Office, the §4 concerns will be adequately addressed.[10/] The scope and nature of the SAAG's services do not reach beyond the Board, his immediate agency. See Buss, *infra*, at note 8.

Here, the SAAG is in no position to exert influence over other matters pending in the Attorney General's Office. The SAAG does not work with the Attorney General's Office in representing the Board. Except for receiving fees for his services, he receives no other support directly or indirectly from the Attorney General's Office. Although a SAAG must regularly submit reports to the Attorney General, the *Guidelines* specifically state that the Attorney General does not direct the SAAG in matters referred to him because of conflicts of interest. His interaction with the Office and its staff is comparable to that of any private attorney who represents a private client opposing the Attorney General. His opportunity to influence any other particular matter pending in the Attorney General's Office is no greater than any other private attorney's.

We conclude that in these circumstances, the §4 phrase "state agency in which he is serving" applies to the agency to which a SAAG has been assigned when the SAAG is otherwise a private attorney who has been appointed to represent that state agency in a particular matter opposed by the Attorney General. Therefore, §4 would not prohibit such a SAAG from also representing other parties in other particular matters that are pending

in the Attorney General's Office and are not pending with the Board.[11/]

The question of what is the agency in which the SAAG serves in the instant case elicits different answers from the parties. The Board seizes on the language of the Attorney General's SAAG appointment letter that purports to yield certain controls of the Attorney General over a SAAG. The letter states that the Attorney General will not direct and control the SAAG's activities in representing the state agency because the matter was referred to a SAAG due to a conflict of interest.[12/] The letter implies what the parties have confirmed; the Attorney General opposes the Board's decision. The Board argues that "serving" the Attorney General under such circumstances would ignore the specific directive of the appointment letter.[13/]

The Attorney General asserts that all SAAGs, regardless of the reasons for their appointment, serve the Office of the Attorney General. To support this assertion, the Attorney General cites several reasons. First, SAAGs derive their authority to act on behalf of the Commonwealth from their appointment. The Attorney General retains the right to terminate or to modify their appointment at any time.

Second, although the case on appeal appears to involve a "conflict of interest" because the Attorney General is one of the appellants who opposes the Board's decision, the Commonwealth can have only one interest. It is the responsibility of the Attorney General to determine that one interest. See G. L. c. 12, §3.[14/]

Third, if the Board's conclusion were affirmed, the powers granted to the Attorney General would be restricted, which would run contrary to the mandate of G. L. c. 12, §3.

Although the Attorney General cites all of these reasons, he emphasizes his role in determining a unified and consistent legal policy for the Commonwealth. *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 163 (1975). *Feeney v. Commonwealth*, 373 Mass. 359, 365 (1977) notes that the Legislature clearly allocated complete responsibility for all of the Commonwealth's legal business to the Attorney General.[15/] The appointment of a SAAG to represent a state agency in a particular matter in which an Assistant Attorney General appears in opposition to that state agency does not modify or restrict the powers granted to the Attorney General under G. L. c. 12, §3, to control all litigation involving the Commonwealth. Moreover, in the instant case should the Attorney General decide that the suit should not be defended, he could decline to appoint a SAAG. Finally, the Attorney General argues that "is it incumbent upon the Attorney General to resolve whatever tensions may arise between different views of the Commonwealth's interests, deciding what the overall interest of the Commonwealth is, and then acting in the manner he deems most appropriate given the interest."

Based upon these reasons, the Attorney General asserts that it would constitute an impermissibly adverse effect upon his authority if, for purposes of §4, a SAAG in these circumstances were deemed to serve only the agency to which he was assigned.

We do not disagree with the Attorney General's discussion of the sources of his authority. Statutory authority and the opinions of the Supreme Judicial Court support his duty "to set a unified and consistent legal policy for the Commonwealth." *Secretary of Administration & Finance* at 163. Our application of §4 in these circumstances will not, contrary to the Attorney General's argument, restrict his authority.

In the limited circumstances of a conflict between an agency and the Attorney General, the Attorney General has yielded certain authority to the SAAG. Our conclusion would not provide the SAAG with more authority or power with respect to his representation of the Board than what had been delegated by the Attorney General. Nothing in our analysis would prevent the Attorney General from dismissing the SAAG assigned to the Board.

We note that under §23(e), in pertinent part, the head of a state agency is permitted to establish and enforce additional standards of conduct. We have said that the Commission, absent special circumstances, will defer to an agency code of conduct governing conflicts of interest that is consistent with the principles of §23. *EC-COI-93-23* (agency imposed standards stricter than those of §3 and §23(b)(2))*; 85-12.* Therefore, §23 will permit the Attorney General to determine whether, in these circumstances, provisions more restrictive than §4's are necessary in light of this opinion.

DATE AUTHORIZED: March 27, 1996

* Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1/] G. L. c. 164, §69H.

[2/] SAAGs may be appointed for several reasons, including, for example: to represent the state or its agencies when the Attorney General's Office does not have a particular legal expertise to represent the matter; to provide legal services when the Attorney General cannot provide personnel; to represent one division of the Attorney General's Office in a matter in which other divisions represent diverse interests; or to represent a state agency when the Attorney General opposes that agency's action.

[3/] We have the benefit of submissions from the Board, which first raised the question in a request for an advisory opinion, and the Legal Counsel to the Attorney General.

[4/] See 18 U.S.C., §§203, 205 (as amended through May 4, 1990, Pub. L. 101-280), which contain nearly identical provisions that narrow the scope of restrictions with respect to special government employees. One of the major purposes of the federal law is to facilitate the government's use of private experts on a part-time basis without depriving the government of protection against unethical conduct on their part. 1962, *U.S. Code Cong. and Admin. News*, 3852, 3853.

[5/] Ordinary definitions of the word "serve" do not help us to answer whether one serves only the Board or both the Board and the Attorney General. *Webster's Third New International Dictionary of the English Language* (1964) offers several applicable definitions: to be of use; answer a purpose; have a function; to hold an office; discharge a duty or function; act in a capacity; to be a servant to; work for; to give the service and respect due to.

[6/] The federal conflict of interest laws upon which §4 is based, 18 U.S.C., §§203, 205 (as amended through May 4, 1990, Pub. L. 101-280) and their legislative history appear to contemplate service to a single agency—that to which the special employee is assigned. See *Memorandum of Attorney General Regarding Conflict of Interest Provisions of Public Law 87-849*, Feb. 1, 1963, reprinted in 18 U.S.C. §201 note, at 279, 280 (1969) and 1962, *U.S. Code Cong. and Admin. News*, 3852.

[7/] A special state employee is subject "to the prohibition against receiving outside compensation or representing private interests with respect to matters in which the State is involved only in situations in which he or *the agency in which he is serving* is concerned, and such special employee is free to deal with *other state agencies* in a private capacity. This again is necessitated by the determination that imposing broad disabilities on special employees would render it impossible for the Commonwealth to have the service of specialists or other capable people for *specific assignments in departments or agencies*." *Id*. (emphasis added).

[8/] Buss suggests the following analysis for determining the size of one's agency:

> If the special employee is serving in the office of a head of a department, presumably every matter in any division of the department is pending in his agency. But suppose the positions are reversed: the special employee works in the division and the matter is pending on a higher departmental level or in some other division of the executive department. There appear to be two possible approaches to resolving this problem. Under the first, emphasis would be placed on determining the identity of the employee's immediate employer. Since a person is a state employee by reason of his connection with §a state agency,' it is at least reasonable to conclude that he serves only one state agency. Under the alternative approach, the employee's agency for purposes of applying this provision would depend upon the particular circumstances of a given case. If it is clear that the scope and nature of an employee's services reach beyond his immediate agency, the employee's agency should be broadly construed in the context of the more inclusive administrative unit, and exemption based on this provision should be narrowed accordingly. When attention is focused on the other part of the problem, namely, where is the matter pending, it is somewhat easier to conclude that the answer will be determined by practical considerations comparable to those suggested under the second alternative approach outlined above. *Id*. at 338.
>
> It would appear that an employee's contact with matters pending in *the agency he is serving*, other than those with which he is directly concerned, would tend to depend on the number of days during which he was present and attending to *that* agency's business. *Id.* at 340 (emphasis added).

[9/] The Senate Committee on the Judiciary's comment on the §203 limitation on special government employees recognizes that such an employee "may attain a considerable degree of influence in an agency he serves." *Id*. at 3858. In discussing the merits of a fifteen day verses a sixty day limit the Committee noted, "The 15-day limit seems much too short and no doubt would often make unavailable to an agency the needed services of an individual with specialized knowledge or skills who must appear before that agency in other connections in his private capacity. The 60-day standard set by the committee seems a more reasonable one, particularly when it is borne in mind that the first restriction applicable to special Government employees continues in effect in any event." *Id*. at 3858-59. The Committee also noted that agencies must make certain that persons serving part-time "who also appear on behalf of outside organizations do not abuse their access to the agency for the benefit of those organizations." *Id.* at 3859. As with G. L. c. 268A, §4, the federal counterparts are intended to guard against abusing access to and influence in an agency.

[10/] We also note that in our continuing efforts to apply Chapter 268A in a comprehensible fashion, we have attempted to be precise in identifying the public agency in which a public employee serves. The Commission's "jurisdiction has consistently been based on the destination of the services which a state employee provides rather than on the identity of the appointing official of the employee.

Otherwise, jurisdiction under G. L. c. 268A would result in anomalies such as judges being considered employees of the governor and executive branch." *EC-COI-90-18*, n. 3.

[11/] Our conclusion does not change our interpretation of the §4 provisions that apply to the SAAG with respect to his private involvement in other particular matters that might come before the Board. In addition, in circumstances in which the Attorney General's Office decided to appoint a SAAG to represent an agency's position with which the Attorney General agreed but may not have the personnel or expertise available to represent the agency, the SAAG would serve *both* the agency and the Attorney General's Office. We assume such a SAAG would be supervised by and have the support of the Office as well as the agency he represents.

[12/] Although neither the appointment letter nor the *Guidelines* so state explicitly, we assume that the specific conflict of interest is governed by the *Canons of Ethics and Disciplinary Rules Regulating the Practice of Law.* See *S.J.C. Rule 3:07, DR-5-105 (A) and (B),* as appearing in 382 Mass. 781 (1981), which generally proscribes the simultaneous representation of clients with adverse interests.

[13/] The Board also argues that the Attorney General's position limits the availability of qualified counsel to represent the Board on such appeals because the area of law in issue is highly specialized. It is likely that counsel with the necessary expertise will also represent private clients who are opposed by the Attorney General with respect to other issues related to the same body of law.

[14/] In pertinent part, G. L. c. 12, §3 provides:

> The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, . . . and in such suits and proceedings before any other tribunal, including prosecutions of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. . . . All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

[15/] In *Feeney,* the issue was whether the Attorney General could prosecute an appeal over the expressed objections of state officers whom he represented. The court held that the Attorney General acted within his authority pursuant to G. L. c. 12, §3 when he prosecuted such an appeal. 373 Mass. at 368.